## QUESTIONS PRESENTED

1. Whether an individual has a substantial personal privacy interest in information concerning his criminal record, when that information is already a matter of public record.

2. Whether any personal privacy interest in such information is outweighed by the public interest in determining whether a company that received lucrative defense contracts with the help of an allegedly corrupt Congressman is dominated by organized crime.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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No. 87-1379

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UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
*Petitioners*,

v.

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENTS

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## STATEMENT OF THE CASE

### A. The Freedom of Information Act Requests

This Freedom of Information Act ("FOIA") case arises out of a CBS News correspondent's investigation of alleged criminal conduct by Daniel Flood, a United States Congressman who eventually pled guilty to charges of conspiring to solicit illegal campaign contributions from prospective government contractors. In January 1978, there were published reports that the United States Attorney in Philadelphia was investigating allegations of

conflict of interest and corruption on the part of Flood and another Congressman, Joshua Eilberg. J.A. 96. CBS News assigned respondent Robert Schakne to investigate the allegations. *Ibid.*

During his investigation, Schakne learned that Congressman Flood had been instrumental in arranging Department of Defense contracts for Medico Industries. *Id.* at 97. Schakne also learned that the Pennsylvania Crime Commission had included Medico Industries in a list of "legitimate businesses dominated by organized crime figures [which] have received a number of lucrative public contracts." *Ibid.* Both the Pennsylvania Crime Commission and the Federal Bureau of Narcotics had identified William Medico, General Manager of Medico Industries, as a "criminal associate" of organized-crime leader Russell Bufalino. *Ibid.* The Pennsylvania Crime Commission had specifically stated that William Medico had a criminal record that included "arrests for suspicion of murder and assault, and convictions for bootlegging and disorderly conduct." *Ibid.*

In light of the great public interest in the investigation of Congressman Flood, and in the relationship between Flood and a business reportedly dominated by organized crime, Schakne sought further information about Medico Industries and its principals, William, Charles, Phillip and Samuel Medico. *Ibid.* Schakne was not content simply to report the Pennsylvania Crime Commission's conclusion that Medico Industries was "dominated by organized crime figures." He sought instead to investigate and confirm that conclusion. Specifically, he sought to ascertain William Medico's full criminal record, and to determine whether and to what extent the other Medicos, all principals of Medico Industries, had criminal records. *Id.* at 97-98.

On February 3, 1978, Schakne submitted a written FOIA request to the Department of Justice, seeking disclosure of any prison sentences, convictions, indictments or arrests of William, Charles, Phillip or Samuel Medico. *Id.* at 38, 98. The Department initially refused to provide any of the requested information. It claimed that disclosure would violate the Privacy Act, 5 U.S.C. § 552a, and that the information was therefore exempt under Exemption 3 of FOIA, which permits the withholding of information that is "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). The Department also claimed that the information was compiled for law enforcement purposes and that its disclosure would "interfere with enforcement proceedings," "deprive a person of a right to a fair trial or an impartial adjudication," and "constitute an unwarranted invasion of personal privacy," 5 U.S.C. (Supp. IV) § 552(b)(7)(A), (B) & (C). J.A. 39, 44, 98.



After Schakne appealed, the Department agreed to disclose the criminal-identification record (*i.e.*, "rap sheet") of William Medico because he was deceased, as Schakne had noted in his request. *Id.* at 49, 99. It otherwise affirmed the denial of Schakne's request, relying solely upon Exemption 7(C) and Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6). J.A. 48, 99.

In September 1978, respondent Reporters Committee for Freedom of the Press filed a similar FOIA request. *Id.* at 53, 99. The Department responded that insufficient information had been provided to permit an accurate search for records pertaining to William Medico (whose rap sheet had already been located and disclosed to Schakne, *id.* at 51-52), and it denied the request for criminal-record information concerning the other Medicos, citing the Privacy Act. *Id.* at 55, 99-100. Following an administrative appeal, the Department affirmed the denial, relying on Exemptions 3 and 7(C). This time the

Department claimed that Exemption 3 was triggered not by the Privacy Act but by 28 U.S.C. § 534, which gives the Attorney General the authority to collect criminal-identification information and exchange it with other federal, state, and local officials. J.A. 59, 100.

### B. The District Court's Decision

Having been unable to obtain any of the information requested with respect to Charles, Phillip or Samuel Medico, Schakne and the Reporters Committee filed suit under FOIA. The complaint sought only the disclosure of "matters of public record" that were responsive to the FOIA requests. *Id.* at 33. Both sides filed motions for summary judgment. *Id.* at 2, 8. The government initially relied almost exclusively on the contention that section 534 of Title 28 restricts disclosure of rap sheets, and that they are therefore exempted from disclosure by statute under Exemption 3. The government also made brief reference to Exemption 6, the general privacy exemption, and in a subsequent brief invoked Exemption 7(C), the privacy exemption for information compiled for law enforcement purposes.

On April 29, 1983, while the cross motions for summary judgment were pending, the government informed the district court of its decision to release all criminal-record information concerning Phillip and Samuel Medico, explaining that they had recently died and that disclosure was intended to be "consistent" with the earlier release of criminal-record information concerning William Medico. J.A. 103-04. As to Charles Medico, the government conceded that there was "a legitimate public interest purpose" warranting disclosure of "financial crime" information, but quickly added that it had no such information. *Id.* at 105. The government continued to withhold all "non-financial crime" information concerning Charles Medico. *Ibid.*



The district court granted the government's motion for summary judgment. It held that rap sheets could be withheld under Exemption 3, and that any responsive information in other documents could be withheld under Exemptions 6 and 7(C). Pet. App. 52a-58a. The court did not explain why Charles Medico could have any reasonable expectation of privacy as to the information sought, but concluded that any crimes other than financial crimes would be irrelevant to the matters respondents were investigating. *Id.* at 57a.

### C. The Court of Appeals' Decision

The court of appeals reversed. It ruled initially that 28 U.S.C. § 534 is not a withholding statute under Exemption 3. Pet. App. 6a-13a. The government does not contest that ruling in this Court. Petition at 6 n.1.

The court also held that release of the criminal-record information requested would not constitute an unwarranted invasion of personal privacy under Exemptions 6 and 7(C). It concluded that there is only a minimal privacy interest in criminal-record information that is a matter of public record. Pet. App. 19a-20a. The court added, however, that for information to be a matter of public record, it is not enough that the information be available. *Id.* at 20a. Rather, the jurisdiction in question would have to have made "an affirmative determination that criminal records must be freely available to the general public and [have] provided a mechanism to ensure implementation of that policy." *Ibid.*

As to the public-interest side of the balancing required by Exemptions 6 and 7(C), the court concluded that deference should be accorded to a state's presumptive judgment that placing material in the public domain serves the public interest. *Id.* at 22a-23a. The court remanded for a determination of whether the Department of Justice holds criminal-record information concerning Charles Medico that is a matter of public record. *Id.* at 26a.

Judge Starr initially concurred in the judgment and in all of the majority opinion except for the discussion of the public-interest side of the balancing test. *Id.* at 27a.

After the government sought rehearing, the court clarified that the district court should determine "as a matter of fact, not law, whether, by reason of the actual practices of the jurisdiction that is the original source, the subject's privacy interest has faded" because the information was a matter of public record. *Id.* at 41a-42a. The court also noted that it "might well have reached a different conclusion" if the government had shown that disclosure of the information would cause particular harm to Charles Medico. *Id.* at 40a.

The court modified its discussion of the public interest in disclosure as well. It explained that instead of deferring to state or local determinations regarding access to criminal records, *id.* at 36a-37a, courts should focus on "the general disclosure policies of [FOIA]," *id.* at 39a (footnote omitted). The court declined to make an assessment of the public interest based on the particular information at issue. *Id.* at 38a. Charles Medico, the court noted, was "alleged to have had dealings with government officials," and it was "up to the citizenry, once informed, to determine the relevance of the age of the arrests or convictions." *Ibid.* Judge Starr dissented. *Id.* at 42a-49a. A suggestion for rehearing en banc was denied, with four judges dissenting. *Id.* at 64a-66a.

The government then sought review in this Court of the court of appeals' rulings concerning Exemptions 6 and 7(C). It abandoned the contention that 28 U.S.C. § 534 is a withholding statute for purposes of Exemption 3. On April 18, 1988, this Court granted certiorari.



## SUMMARY OF ARGUMENT

The information sought by Schakne and the Reporters Committee is not exempt under either of FOIA's privacy exemptions, Exemption 6 and Exemption 7(C), because its disclosure would not result in an "unwarranted" (Exemption 7(C)) or "clearly unwarranted" (Exemption 6) "invasion of personal privacy." There is no significant personal privacy interest in criminal-record information that is a matter of public record, and any minimal personal privacy interest in such information is easily outweighed by the compelling public interest in disclosure of the information sought in this case.

For information to be eligible for withholding under Exemption 6 or Exemption 7(C), there must be a legitimate, objectively reasonable expectation of personal privacy as to that information. Only disclosures that compromise such expectations implicate Congress's purpose of requiring "a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

There can be no justifiable expectation of personal privacy with respect to criminal-record information that is a matter of public record. Convictions, sentences, indictments, and arrests are inherently public matters; they are official steps in the process by which society formally condemns individuals for breaking the law. The arrest and prosecution of criminals is a subject of great public concern, and there is an historic tradition of opening criminal proceedings to the public. Moreover, records of convictions, sentences, indictments, and arrests are matters of public record in virtually all jurisdictions. This practice is important both because it reflects the widely held understanding that official steps in a criminal prosecution are public matters, and because there can be little privacy interest in information that is already a matter

of public record. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 494-95 (1975).

If an individual has any legitimate expectation of personal privacy in his criminal record, that interest pales in comparison to the strong public interest in disclosure in this case. Respondents sought to confirm the official finding of the Pennsylvania Crime Commission that a defense contractor was "dominated by organized crime figures." J.A. 97. And they sought to explore the ties between that defense contractor and a powerful Congressman, then under investigation for corruption and conflict of interest, *id.* at 96, who had been instrumental in steering defense contracts to the company, *id.* at 97. Exposure of corruption in defense contracting was a matter of public interest in 1978, just as it is in 1988.

## ARGUMENT

### I. ONLY INFORMATION IMPLICATING A LEGITIMATE EXPECTATION OF PERSONAL PRIVACY IS ELIGIBLE FOR WITHHOLDING UNDER EXEMPTIONS 6 AND 7(C).

In enacting FOIA, Congress intended to establish "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360-61 (1976), *quoting* S. Rep. No. 813 at 3. As this Court noted in *EPA* v. *Mink*, 410 U.S. 73, 79 (1973), the prior public disclosure law, § 3 of the Administrative Procedure Act of 1946, 60 Stat. 237, 238, *codified at* 5 U.S.C. § 1002 (1964), "was plagued with vague phrases" that gave agencies virtually unlimited discretion to withhold information. *See* S. Rep. No. 813 at 3. Congress undertook to replace that statute with a general mandate of disclosure that was subject to specific, limited exemptions. "To make crystal clear the congressional objective . . . Congress provided in § 552(c) that nothing in the Act should be read to 'authorize withholding of information . . . , except as *specifically* stated . . . .'" *Department of the Air Force* v. *Rose*, 425 U.S. at 361 (emphasis added).



The two specific exemptions at issue here, Exemptions 6 and 7(C), are limited by their terms to "unwarranted" (Exemption 7(C)) and "clearly unwarranted" (Exemption 6) "invasion[s] of personal privacy." The threshold issue is whether disclosure "would" (Exemption 6), or "could reasonably be expected to" (Exemption 7(C)), constitute an "invasion of personal privacy." Only if such an invasion would result is there a need to balance the privacy interest at stake against the public interest in disclosure to determine whether the invasion of privacy would be "unwarranted" or "clearly unwarranted."[1]

Whether the disclosure of information would result in an "invasion of personal privacy" does not depend simply on whether an individual might prefer to limit circulation of the information to others. Under FOIA, as in other areas of the law, personal privacy is more than a subjective desire for secrecy. Information is private only when it is personal information of a type that is not ordinarily made public, and when there is a legitimate, objectively reasonable expectation that it will remain private.

Thus, this Court has emphasized that a subjective expectation of privacy is insufficient to create a privacy interest under the Fourth Amendment; there must be "a *justifiable*, a '*reasonable*' or a '*legitimate* expectation of privacy.'" *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979) (installation of pen register does not invade a legitimate expectation of privacy) (emphasis added).[2] Similarly,

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[1] *See, e.g., Ripskis* v. *Department of Housing & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*per curiam*) (Exemption 6); *Ferri* v. *Bell*, 645 F.2d 1213, 1217 (3d Cir. 1981) (Exemption 7(C)), *modified*, 671 F.2d 769 (1982); *Getman* v. *NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971) (Exemption 6).

[2] *See also, e.g., California* v. *Greenwood*, 108 S. Ct. 1625, 1628-29 (1988) (there is no reasonable expectation of privacy as to garbage

there can be no civil liability for invasion of privacy unless facts concerning one's "private life" are disclosed, and "the matter publicized is of a kind that (a) would be highly offensive *to a reasonable person*, and (b) is not of legitimate concern to the public." *Restatement (Second) of Torts* § 652D (1977) (emphasis added). The same principles apply to FOIA's privacy exemptions.

The legislative history of FOIA demonstrates that Congress did not intend Exemptions 6 and 7(C) to apply to whatever information an individual might consider embarrassing. In enacting Exemption 6, Congress intended that there be "a balancing of interests between the protection of an individual's *private affairs* from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. Rep. No. 813 at 9 (emphasis added). Congress was concerned that "[s]uch agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great quantities of files" that are "*highly personal* to the person involved," *ibid.* (emphasis added), and contain "*intimate details*," H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added). Congress's concern was with unjustified invasions of reasonable and legitimate expectations of personal privacy.

The government places heavy reliance upon a reference in the 1966 House Report on FOIA to "those kinds of files the disclosure of which might harm the individual." *Ibid.* As this Court has noted, that reference suggests that the phrase "personnel and medical files and *similar* files" (emphasis added) was not intended "to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information." *United States*

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bags left on the curb in front of one's home); *Hudson* v. *Palmer*, 468 U.S. 517, 525-26 & n.7 (1984) (a prisoner has no legitimate expectation of privacy in his prison cell).



*Department of State* v. *Washington Post Co.*, 456 U.S. 595, 602 (1982). Any information the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy" is exempt from disclosure under Exemption 6, without regard to the nature of the file in which the information appears. But it does not follow that Exemptions 6 and 7(C) were intended to apply to *any* information that might harm an individual. The harm that Congress addressed in these exemptions was an "invasion of personal privacy," nothing else.[3] *See* Pet. App. 19a n.12.

As this Court recognized in *Department of the Air Force* v. *Rose*, Exemption 6 was intended to be a "limited exemption," applicable only "where privacy was threatened." 425 U.S. at 372. "Exemption 6 on its face is concerned with protecting personal privacy, and no more." *Washington Post Co.* v. *United States Department of Health & Human Services*, 690 F.2d 252, 260 n.23 (D.C. Cir. 1982). The same is true of Exemption 7(C).

In keeping with the statutory language and the legislative history, courts have consistently recognized that Exemptions 6 and 7(C) do not apply to information as to which there is no legitimate expectation of privacy. *See, e.g., Washington Post Co.* v. *United States Department of Health & Human Services*, 690 F.2d at 263; *International Brotherhood of Electrical Workers* v. *United States Department of Housing & Urban Development*, 593 F. Supp. 542, 544 (D.D.C. 1984), *aff'd*, 763 F.2d 435 (D.C. Cir. 1985); *National Western Life Ins.*

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[3] That Congress has recognized a distinction between an "invasion of personal privacy" and other types of personal harm is confirmed by Exemption 7(F), which applies to disclosures likely to "endanger the life or physical safety of any individual." 5 U.S.C. (Supp. IV) § 552(b)(7)(F). When Congress has intended to provide protection from personal harm other than an "invasion of personal privacy," it has made that intent clear.

*Co.* v. *United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980). Scholarly commentary has likewise underscored the need for an objective test of privacy under Exemption 6. *See* Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. Legal Studies 727, 752 (1980).

In sum, Exemptions 6 and 7(C) do not encompass any and all information that an individual might consider embarrassing. See also pages 27-28, *infra*. Whether release of the information sought by respondents would constitute an "invasion of personal privacy" depends upon whether there is a legitimate and reasonable expectation of personal privacy in criminal-history information that is a matter of public record.

## II. THERE CAN BE LITTLE OR NO EXPECTATION OF PERSONAL PRIVACY AS TO CRIMINAL-HISTORY INFORMATION THAT IS A MATTER OF PUBLIC RECORD.

### A. The Public Nature of Criminal-History Information

Disclosure of the information sought by respondents would not compromise any legitimate expectation of privacy. Convictions, sentences, indictments and arrests are fundamentally public, not private, matters. Moreover, respondents have sought only criminal-history information that is in fact a matter of public record.

The government largely ignores the question of how a criminal conviction, sentence, or indictment can reasonably be regarded as private, preferring to focus almost exclusively on arrests. Br. 33-37, 42. But arrests are only one of the categories of information sought in respondents' FOIA requests. With the exception of information on financial crimes, the government has refused to provide *any* category of information, including convictions, concerning Charles Medico—either by disclosing responsive information or by indicating that none exists.



#### 1. *Convictions and Sentences*

There can be no justifiable expectation of personal privacy with respect to a criminal conviction and sentence. A crime is not a private wrong, but an offense against the public. It is "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community." Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 405 (1958). That is precisely what a judgment of criminal conviction is—"a formal and solemn pronouncement of the moral condemnation of the community." By its very nature, then, a criminal conviction is not something that concerns an individual's private life; it involves the entire community.

Under no circumstances can a conviction be considered private—unless, perhaps, society has chosen to expunge it. The convicted criminal may wish that his conviction were secret, but that subjective desire hardly creates a justifiable expectation of privacy. As the *Restatement (Second) of Torts* (1977) notes: "Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed." Section 652D, Comment f. The Restatement makes clear, in fact, that the public's legitimate interest extends well beyond the fact of a conviction; it includes, at the very least, facts about an individual that might explain his criminal conduct. Section 652D, Comment h. The public's interest certainly extends to the conviction itself. "Once a person has been convicted of a crime he can have no legitimate expectation that the fact of his conviction will remain a private matter, shielded from public view." *Ferri* v. *Bell*, 1 Gov't Disclosure Cases (P-H) ¶ 79,206 at 79,387 (M.D. Pa. 1979), *rev'd as to other records*, 645 F.2d 1213 (3d Cir. 1981), *modified*, 671 F.2d 769 (1982).[4]

[4] In *Ferri* the government did not appeal the district court's ruling ordering disclosure of conviction records under FOIA.

Chief Justice Rehnquist made essentially this point in a 1974 lecture:

> I would think that if one carries the principles of privacy advocated [with respect to disclosure of criminal-record information to employers] to their ultimate extreme, which I suppose would mean sealing records of actual criminal convictions which had taken place in open court, we would see the claim of privacy competing not merely with the claim of fair and effective law enforcement, but the claim of the citizenry to be fully informed about what is going on about them. The trend of recent legislation has been to open up governmental activities to public inspection and to permit public access to many kinds of government records that were formerly thought to be confidential. If this trend is wise and desirable in every other area, it seems to me that *it would take a far stronger claim of privacy than any that I have heard made to require that the exact opposite result be reached in the case of actual criminal conviction.*[5]

The undeniable reality is that criminal prosecutions and convictions have never been regarded as private or secret. In *Cox Broadcasting Corp.* v. *Cohn*, this Court declared that "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecution . . . are without question events of legitimate concern to the public . . . ." 420 U.S. at 492. In *In re Oliver*, 333 U.S. 257 (1948), the Court said it was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *Id.* at 266 (footnote omitted).

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[5] Justice William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, Part I, p. 19 (Sept. 26-27, 1974) (emphasis added).



The tradition of opening criminal proceedings to the public is so well established that this Court has held that the public has a right of access to criminal proceedings under the First Amendment. *See Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501 (1984); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980).[6] And one of the reasons for recognizing a constitutional right of access to criminal proceedings is that the public has an interest in knowing that those who commit crimes are convicted and punished. *See Richmond Newspapers, Inc.*, 448 U.S. at 571.

The tradition of public access is not limited to criminal proceedings themselves; convictions and sentences are documented in court files and remain matters of public record in all jurisdictions. *See* Search Group, Inc., Bureau of Justice Statistics, *Privacy and Security of Criminal History Information: Privacy and the Media* 17 (1979) (hereafter cited as *"Criminal History Information"*). The universal practice of making such information freely accessible to the public reflects the common understanding that convictions and sentences are public matters. *See Cox Broadcasting*, 420 U.S. at 495 ("By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.").[7]

The fundamental nature of a criminal conviction as a formal public statement of condemnation, the public in-

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[6] Even when legitimate privacy concerns of witnesses or jurors are involved, the public may be excluded from criminal proceedings only upon a specific finding of a compelling interest that cannot be adequately protected in some other way. *See Press-Enterprise Co.*, 464 U.S. at 511-12; *Globe Newspaper Co.*, 457 U.S. at 606-07.

[7] This understanding is also shown by the practice of many newspapers of printing lists of convictions and sentences on a regular basis. No one would suggest for a moment that the publication of such lists constitutes an invasion of privacy.

terest in seeing that wrongdoers are convicted, the historic openness of criminal proceedings, and the fact that convictions and sentences are almost always a matter of public record—all of these factors constitute powerful evidence that there is no legitimate expectation of personal privacy as to criminal convictions and sentences.

2. *Indictments*

There is likewise no personal privacy interest in information indicating that an individual was indicted for committing a criminal offense. An indictment is a formal accusation of criminal conduct. It must be approved by grand jurors drawn from the community. And it charges a serious offense; minor offenses are prosecuted by information. *See* 2 W. LaFave & J. Israel, *Criminal Procedure* § 15.1 at 278-79 (1984).

An individual who has been indicted has a right to expect that he will be accorded a fair trial. He has no right, however, to expect that his indictment will be kept secret. He has been formally charged with committing a crime pursuant to the procedure established by society for initiating the prosecution of serious offenses. Far from being a private matter, such a charge is a matter of legitimate public concern.

The courts have repeatedly recognized that the strong public interest in criminal prosecutions is not limited to convictions and sentences, and that the public also has a strong interest in learning about the filing of criminal charges. *See, e.g.*, *FDIC* v. *Mallen*, 108 S. Ct. 1780, 1790 (1988); *United States* v. *Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985); *Tennessean Newspaper, Inc.* v. *Levi*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975). That a grand jury has found probable cause to believe a serious offense was committed is a matter of substantial and legitimate interest to the public.

The public nature of indictments is also reflected in the requirement that they be returned in open court except in



extraordinary circumstances. Rule 6(f) of the Federal Rules of Criminal Procedure provides: "The indictment shall be returned by the grand jury to a federal magistrate *in open court.*" (Emphasis added.) And this Court has declared that "[c]riminal proceedings cannot be said to be brought or instituted until a formal charge is *openly made* against the accused . . . ." *Post* v. *United States*, 161 U.S. 583, 587 (1896) (emphasis added). Returning an indictment in open court is not simply a modern procedure; it was a basic requirement at common law that an indictment be "publicly delivered into court." 4 W. Blackstone, *Commentaries* *301; *see Renigar* v. *United States*, 172 F. 646, 648 (4th Cir. 1909).

After an indictment has been returned, it almost invariably becomes a matter of public record. *See Criminal History Information*, *supra*, at 17. Indeed, there is an "historic tradition of public access to the charging document in a criminal case," which "reflects the importance of its role in the criminal trial process and the public's interest in knowing its contents." *United States* v. *Smith*, 776 F.2d at 1112; *see also Cox Broadcasting*, 420 U.S. at 496.

As with a conviction, then, there can be no justifiable expectation of privacy with respect to an indictment.

3. *Arrests*

Arrests are also public matters. As Chief Justice Rehnquist emphasized in his 1974 lecture concerning privacy:

> An arrest is not a "private" event. An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very definition of the term it involves an intrusion into a person's bodily integrity. *To speak of an arrest as a private occurrence seems to me to stretch*

> *even the broadest definitions of the idea of privacy beyond the breaking point.*[8]

The fact that the police believe a crime has been committed and have formally acted on that belief is a public, not a private, matter. An arrest is a formal, official act reflecting the conclusion that there is probable cause to believe an individual has committed a crime.

> An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.

*Terry* v. *Ohio*, 392 U.S. 1, 26 (1968) (footnote omitted). The significance of an arrest is evident from the rule that an arrest justifies a complete search of the person. *See United States* v. *Robinson*, 414 U.S. 218 (1973). If the police have probable cause to believe an individual has committed a crime and formally act on that belief, that is a fact of genuine interest to the community. *See, e.g., Tennessean Newspaper, Inc.* v. *Levi*, 403 F. Supp. at 1321.

In *Paul* v. *Davis*, 424 U.S. 693 (1976), this Court stressed the official nature of an arrest in holding that the deliberate dissemination of information concerning an arrest does not amount to an unconstitutional invasion of privacy. The Court noted that Davis's "claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest." *Id.* at 713.[9]

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[8] Rehnquist, *supra*, Part I, at 12-13 (emphasis added).

[9] In its *amicus curiae* brief, the American Civil Liberties Union ("ACLU") incorrectly states that *Paul* v. *Davis* recognized a right to recover for harm from disclosure of an arrest record "in some circumstances." ACLU Br. 17, citing 424 U.S. at 701. In fact, the Court did not recognize a right to such recovery under any circumstances. The ACLU's reliance on a footnote in the dissent is equally misplaced. ACLU Br. 17-18. That footnote only dramatizes the fact that the Court's opinion treated arrests in a manner completely incompatible with those state and lower federal court decisions that had suggested that arrest records implicate a privacy interest.



The public nature of arrests is also evident from the fact that in the vast majority of jurisdictions arrest books and police blotters are open to the public by law or long-standing tradition. *See, e.g., Dayton Newspapers, Inc.* v. *City of Dayton*, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976); D.C. Code §§ 4-131(4), 4-135 (1988 Repl. Vol.). *See generally Criminal History Information, supra*, at 17. Secret arrests are odious to a democratic society, and that is one of the reasons arrests traditionally have been regarded as public in this country. *See, e.g.*, S. Rep. No. 1775, 83d Cong., 2d Sess. 1 (1954); H.R. Rep. No. 2332, 83d Cong., 2d Sess. 1 (1954).[10]

The public nature of an arrest is not altered by the fact that a conviction did not result or, for that matter, the fact that the arrest itself was not justified. Questions of fairness may arise when employers rely upon bare arrest records. But those questions may be addressed by educating employers about the unfairness of

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[10] In considering the ACLU's arguments about arrests, the Court should bear in mind that the ACLU does not accept the widely followed practice of making arrest books and police blotters available to the public. The ACLU has carried its concerns about improper use of arrests by employers to the point of asserting that arrest records should not be publicly available even at their source. *See, e.g., Dissemination of Criminal Justice Information: Hearings on H.R. 188, H.R. 9783, H.R. 12574, and H.R. 12575 Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 78, 92-93 (1973) (testimony of Aryeh Neier, Executive Director of the ACLU) (hereafter *"House Criminal Justice Hearings"*). Having failed to gain acceptance of that position, the ACLU is now attempting to stretch Exemptions 6 and 7(C) to reach arrests.

relying upon such records, *see* Rehnquist, *supra*, Part I at 19, or by enacting legislation that restricts reliance upon arrests in employment decisions. Those questions do not transform fundamentally public information into private information protected by Exemptions 6 and 7(C). They certainly do not confer a legitimate expectation of personal privacy upon those who, like Charles Medico, seek the award of lucrative defense contracts.

In *Tennessean Newspaper, Inc.* v. *Levi*, the district court held that Exemption 7(C) did not encompass the age, address, marital status, or employment status of persons who have been arrested or indicted; the circumstances of an arrest; the scope of the investigation leading to an arrest or indictment; or other background material. 403 F. Supp. at 1320-21. Here, respondents have sought only an identification of any arrests of Charles Medico; they have not requested underlying details or background information. And any conceivable privacy interest is diminished, if not eliminated altogether, by the fact that respondents seek only information that is a matter of public record.

### B. The Public-Record Status of the Information Sought in This Case

As demonstrated above, convictions, sentences, indictments, and arrests are generally matters of public record because they are intrinsically matters of public concern. That they may in extraordinary cases be sealed or expunged need not concern the Court in this case, for this FOIA suit has been limited expressly to criminal-record information that is in fact a matter of public record. J.A. 33. If Charles Medico was convicted, for example, and the official record of the conviction was later sealed or expunged, information reflecting that conviction is beyond the scope of respondents' complaint. Respondents seek no more than members of the public could obtain from court files or police records if they but knew which records to check.



Whatever may be said of criminal-record information that has been expunged or otherwise removed from the public domain, there clearly is no substantial personal privacy interest when such information remains a matter of public record. As a general matter, the fact that information is already a matter of public record is itself a strong indication that there is no legitimate expectation of personal privacy. The *Restatement (Second) of Torts* states that "there is no liability [for invasion of privacy] for giving publicity to facts about the plaintiff's life that are matters of public record." § 652D, Comment b. Following that principle, courts have routinely rejected invasion-of-privacy claims based on the disclosure of public-record information.[11]

In *Cox Broadcasting*, this Court concluded that even the *victim* of a crime has no substantial privacy interest in information contained in an indictment that is a matter of public record, because "the prevailing law of invasion of privacy generally recognizes that *the interests in privacy fade when the information involved already appears on the public record.*" 420 U.S. at 494-95 (emphasis added). *A fortiori*, a person arrested, indicted, or con-

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[11] *See, e.g., Valentine* v. *C.B.S., Inc.*, 698 F.2d 430, 432-33 (11th Cir. 1983); *McNally* v. *Pulitzer Pub. Co.*, 532 F.2d 69, 78 (8th Cir. 1976); *Thompson* v. *Curtis Publishing Co.*, 193 F.2d 953 (3d Cir. 1952); *Singer* v. *Bell*, 613 F. Supp. 198, 204 (S.D.N.Y. 1985); *Bergman* v. *Stein*, 404 F. Supp. 287, 296 (S.D.N.Y. 1975); *Frith* v. *Associated Press*, 176 F. Supp. 671, 674 (D.S.C. 1959); *Pemberton* v. *Bethlehem Steel Corp.*, 502 A.2d 1101, 1118-19 (Md. App. 1986), *cert. denied*, 107 S. Ct. 571 (1986); *Sparks* v. *Thurmond*, 171 Ga. App. 138, 319 S.E.2d 46, 50 (1984); *Montesano* v. *Donrey Media Group*, 668 P.2d 1081, 1084-86 (Nev. 1983), *cert. denied*, 466 U.S. 959 (1984); *Kilgore* v. *Younger*, 30 Cal. 3d 770, 640 P.2d 793, 797, 180 Cal. Rptr. 657 (1982) (in bank); *Baker* v. *Burlington Northern, Inc.*, 99 Idaho 688, 587 P.2d 829, 832-33 (1978); *Bell* v. *Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84, 88 (Ky. 1966); *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147, 148-49 (1962); *Meetze* v. *Associated Press*, 230 S.C. 330, 95 S.E.2d 606, 610 (1956).

victed for *committing* a crime has no significant privacy interest in public-record information reflecting those official actions.[12]

The government's attempt to explain away *Cox Broadcasting* cannot withstand scrutiny. The government states:

> The rationale of *Cox Broadcasting* . . . was not . . . that the public availability of information somehow renders any remaining privacy interest in that information insignificant. Rather, this Court recognized that it was dealing with a "sphere of collision between claims of privacy and those of the free press," with legitimate interests to be considered on both sides (420 U.S. at 491).

Br. 21 n.5. In fact, however, the Court put to one side "the broader question" whether a state may "define and

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[12] *Amici curiae* Search Group, Inc. *et al.* (hereafter "Search") suggest that

> not all of the types of information included in a rap sheet are publicly available from their original sources. For example, correctional information customarily is not publicly available from the jail or correctional institution that is the source of the data. Similarly, charging information is generally not publicly available from the prosecutorial agency that is the source of the data.

Br. 22. This attempt to obfuscate matters should be disregarded. Respondents have made clear from the time they filed their complaint that they seek only the particular categories of criminal-history information identified, and only information that is a matter of public record. J.A. 33. All parties have understood throughout that that is the only information at issue. Thus, when the government disclosed records concerning Phillip Medico, it redacted information that did not fall within the discrete categories of information sought. *Id.* at 117-19. Furthermore, the only "charging information" sought—information about indictments—is publicly available in court files. See page 17, *supra*. Whether it is available "from the prosecutorial agency" is totally irrelevant. The only "correctional information" sought—information about sentences—is also routinely a matter of public record as part of judgments of conviction.



protect an area of privacy free from unwanted publicity in the press." 420 U.S. at 491. It was unnecessary to decide that broader question precisely because the public-record status of the information meant that no substantial privacy interest was at stake. *Id.* at 494-95.[13]

Numerous decisions under FOIA have recognized that in general there can be little or no privacy interest in matters of public record. For example, in *Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131 (4th Cir. 1977), the court found only a "minimal" privacy interest in information which "is, or will be, part of the public record" in an NLRB proceeding. *Id.* at 1136. Similarly, in *Congressional News Syndicate* v. *United States Department of Justice*, 438 F. Supp. 538 (D.D.C. 1977), the court assigned little weight to the alleged privacy interest in po-

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[13] The government argues that "at the time Congress enacted Exemption 7(C), there was substantial support for the notion that publication of old conviction records could be an actionable invasion of privacy. See *Briscoe* v. *Reader's Digest Ass'n*, 4 Cal. 3d 529, 541, 483 P.2d 34, 43, 93 Cal. Rptr. 866, 875 (1971)." Br. 21 n.5. *Briscoe*, the only case cited by the government, was contrary to the overwhelming weight of authority existing in 1974. This Court recognized as much in *Cox Broadcasting*, which was handed down less than four months after the enactment of Exemption 7(C). The Court was fully aware of *Briscoe*, *see* 420 U.S. at 475, but expressly concluded that *"the prevailing law of invasion of privacy* generally recognizes that the interests in privacy fade when the information involved already appears on the public record." *Id.* at 494-95 (emphasis added). Because the government simply has not shown that this Court mischaracterized the state of the law, *Briscoe* provides not the slightest basis for suggesting that Congress intended that Exemption 7(C) cover old conviction records. On the contrary, the numerous pre-1974 decisions rejecting invasion of privacy suits based on the disclosure of public-record information, see note 11, *supra*, underscore how unlikely it is that either Exemption 7(C) or Exemption 6 (since many of the relevant cases were decided prior to 1966) was intended to cover such matters. *See Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979) (it is appropriate to assume that members of Congress know the law).

litical contributions that were required to be publicly reported. As the court explained, "the Federal Corrupt Practices Act disclosure requirements strip contributors and recipients equally of whatever cloak of privacy their relationship would have had in the statute's absence." *Id.* at 543 (citation omitted).[14]

*United States Department of State* v. *Washington Post Co.*, 456 U.S. 595 (1982), is in no way inconsistent with these decisions. The only issue decided in that case was the meaning of the phrase "similar files" in Exemption 6. The court of appeals had interpreted it to require a threshold showing that information be as highly personal or as intimate as information in "personnel and medical files." *See id.* at 598. This Court granted certiorari "to review the Court of Appeals' construction of the similar files language," *ibid.*, and held that all records concerning identifiable individuals constitute "similar files," *id.* at 602. The Court did not decide whether the disclosure sought would constitute an invasion of personal privacy or, if so, whether that invasion would be

[14] *Accord, Akron Standard Division of Eagle-Pitcher Industries, Inc.* v. *Donovan*, 780 F.2d 568, 573 (6th Cir. 1986) (Exemption 7(C) held inapplicable to documents concerning job performance of employee allegedly fired in retaliation for filing safety complaint and engaging in union activities; the employee's job performance had been fully explored in public agency proceedings); *Radowich* v. *United States Attorney*, 501 F. Supp. 284, 288 (D. Md. 1980) ("[I]t is not clear that any meaningful concern over personal privacy can exist with regard to this information, when so much of it has already been made public during the past several years."), *rev'd on other grounds*, 658 F.2d 957 (4th Cir. 1981); *Associated General Contractors* v. *Environmental Protection Agency*, 488 F. Supp. 861, 863 (D. Nev. 1980) (blanket denial of access to personnel data of government employees, where "[m]ost of such information [was] a matter of public record somewhere," held sufficiently unreasonable to justify the award of attorney's fees); *Information Acquisition Corp.* v. *Department of Justice*, 444 F. Supp. 458, 464 (D.D.C. 1978) (fact that prosecutors' appointment status was generally a matter of public record made it "difficult to understand" how disclosure could constitute an invasion of privacy).



clearly unwarranted. It left those questions to be decided on remand. *Id.* at 602-03.[15]

Contrary to what the government suggests, Br. 32, the Court did *not* state that the public-record status of citizenship could not be decisive in "the weighing of interests to be conducted" on remand. The Court concluded only that the public-record status of that information was not decisive of whether the documents were "similar files." As the Court noted, "personnel and medical files" also include public-record information. 456 U.S. at 602-03 n.5. The Court expressly recognized, however, that "'[t]he public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a clearly unwarranted invasion of personal privacy' . . . ." *Ibid.*[16]

[15] If anything, the Court's opinion highlights the importance of the phrase "clearly unwarranted invasion of personal privacy" as a limitation on the reach of Exemption 6. The Court concluded that the phrase "similar files" should be broadly construed because the phrase "clearly unwarranted invasion of personal privacy" was intended to "hold[] Exemption 6 'within bounds.'" 456 U.S. at 600 (citation omitted).

The courts have applied a three-part test under Exemption 6. To withhold documents under the exemption, the agency must establish (1) that they constitute personnel or medical or similar files, (2) that disclosure would constitute an invasion of privacy, and (3) that the invasion would be clearly unwarranted. *See, e.g., Ripskis* v. *Department of Housing and Urban Dev.*, 746 F.2d at 2-3; *Washington Post Co.* v. *United States Dep't of Health and Human Services*, 690 F.2d at 260-61. The first prong of this test, the only one at issue in *United States Department of State* v. *Washington Post Co.*, is not at issue here.

[16] Respondents need not quarrel with Professor Keeton's statement, relied on by the government, Br. 21, that "merely because [a fact] can be found in a public record, does not mean that it should receive widespread publicity if it does not involve a matter of public concern." W.P. Keeton, *Prosser and Keeton on The Law of Torts* 859 (5th ed. 1984). There may be matters that are re-

The government argues that criminal-record information in court files and police records may be difficult to locate, Br. 19, but an individual's interest in maintaining difficulty of access to such information does not make that information private. The focus of FOIA is on information,[17] and the information is the same when it is reflected in publicly available documents in the source jurisdiction as it is when it is incorporated in the FBI's files. Collecting the information in a different place does not somehow transform it into private data.[18]

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flected in some public records that could properly be withheld if sought from a federal agency under FOIA. Here, however, the claimed interest in privacy is not only undermined by the fact that the information sought "can be found" in a public record. The information is systematically and routinely made a matter of public record in virtually all jurisdictions and, as demonstrated above, is inherently a "matter of public concern." *Ibid.*

[17] *See FBI* v. *Abramson*, 456 U.S. 615, 626 (1982) ("in determining whether information in a requested record should be released, the Act consistently focuses on *the nature of the information* and the effects of disclosure") (emphasis added).

[18] This Court has recognized that when the police use modern technology to obtain information that they could obtain through surveillance from public places, no legitimate expectation of privacy is invaded, since the information was publicly disclosed in any event. In *United States* v. *Knotts*, 460 U.S. 276 (1983), the Court held that it was irrelevant that the police used a beeper to track an automobile, in addition to visual surveillance from public places:

> The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

*Id.* at 282. It is likewise irrelevant that respondents seek to obtain information that modern technology now allows to be stored and easily accessed in computers. As in *Knotts*, the information is public in any event, and modern technology has affected only the means of obtaining the information, not the nature of the information.



The weakness of the government's argument that criminal-history information is private is illustrated by its own preferred definition of privacy. Privacy, the government asserts, is "the claim of individuals * * * to determine for themselves when, how, and to what extent information about them is communicated to others," and the individual's "right to control dissemination of information about himself." Br. 20 (citations omitted). As a general matter, however, an individual clearly has no right to "determine for [himself]" or "to control" whether his criminal conviction, sentence, indictment or arrest should be known to others. The government's reliance on these definitions only serves to highlight how incongruous it is to suggest that convictions, sentences, indictments and arrests are private matters. Particularly in light of the principle that "FOIA exemptions are to be narrowly construed," *United States Department of Justice* v. *Julian*, 108 S. Ct. 1606, 1611 (1988); *see Department of the Air Force* v. *Rose*, 425 U.S. at 361, the government's position is wholly untenable.

### C. Factors Cited by the Government as Creating a Substantial Interest in Personal Privacy

The government cites several factors that purportedly could give rise to a substantial privacy interest in criminal-record information: the potential for embarrassment, the lack of notoriety of the criminal proceedings, the passage of time, and the fact that the individual involved now lives far from where the proceedings occurred. Br. 33-34. None of these factors establishes the existence of a legitimate expectation of personal privacy.

1. The mere fact that criminal-record information is "derogatory," *id.* at 33, and that its disclosure may be embarrassing, *id.* at 34, does not make it private. As noted above, the very purpose of a criminal conviction is to condemn the defendant for violating the law. Information reflecting such a condemnation is obviously de-

rogatory and embarrassing. It scarcely follows, however, that there can be a reasonable expectation that the condemnation will be kept secret.

There are many facts that would be embarrassing but are not in the least private. A government official who used public funds to pay personal expenses would undoubtedly be embarrassed by the revelation of such misconduct, but no one would suggest that the revelation was an invasion of privacy. Similarly, an American citizen who sold classified information to a foreign power would surely be embarrassed by the disclosure of his actions, but again there would be no invasion of privacy. As the court of appeals noted, the government's attempt to equate embarrassment with an invasion of privacy "proves too much. Virtually any unflattering information, even already well-distributed in the public domain, may cause further embarrassment when reintroduced." Pet. App. 19a.

Unlike *United States Department of State* v. *Washington Post Co.*, this case does not involve a claim that release of the requested information would subject anyone to a "'real threat of physical harm,'" 456 U.S. at 597, or to any particular harm at all. Indeed, the court of appeals specifically stated: "had it been shown to us that disclosure of Medico's 'rap sheet' would cause him particular harm, . . . we might well have reached a different conclusion." Pet. App. 40a. There was no such showing, and the theoretical possibility that some particular harm could result is clearly insufficient to make Exemption 6 or Exemption 7(C) applicable. *See, e.g.*, *Department of the Air Force* v. *Rose*, 425 U.S. at 380 n.19 ("The legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities.").

2. Lack of notoriety likewise does not establish the existence of a substantial privacy interest. A criminal conviction or charge that received little notice at the time



may become a matter of great interest to the public in light of later events. The absence of prior publicity scarcely gives the defendant a right to insist that the matter not be discussed when it becomes newsworthy.

3. That time has passed, or that an individual now lives a great distance from where the crime or the criminal proceeding occurred, does not create a privacy interest. Again, such facts concern only the likelihood that a person's current acquaintances know about his criminal record; they have no bearing on whether he can justifiably expect to keep them from hearing about it.

As a general matter, the publication of facts that are of legitimate public concern—including criminal convictions—does not constitute an actionable invasion of privacy simply because a considerable period of time has passed since the events in question occurred. In *Montesano* v. *Donrey Media Group*, 668 P.2d 1081 (Nev. 1983), *cert. denied*, 466 U.S. 959 (1984), for example, a newspaper article concerning the recent murder of a Las Vegas policeman recounted the history of Las Vegas police officers who had been killed in the line of duty, and described the plaintiff's hit-and-run conviction arising from an accident in which a policeman had been killed more than 20 years earlier, as well as his conviction for possession of marijuana, which was almost as old. The court found no invasion of privacy, because the information was a matter of public record and was relevant to a subject of public interest.[19]

The criminal process itself takes note of an individual's past criminal record at numerous stages, including the

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[19] *Accord, Estill* v. *Hearst Publishing Co.*, 186 F.2d 1017, 1022 (7th Cir. 1951); *Sidis* v. *F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940); *Rawlins* v. *Hutchinson Publishing Co.*, 218 Kan. 295, 543 P.2d 988, 993-96 (1975); *Barbieri* v. *News-Journal Co.*, 56 Del. 67, 189 A.2d 773, 775 (1963); *Smith* v. *Doss*, 251 Ala. 250, 37 So.2d 118, 121 (1948).

investigation, arrest, decision to charge, plea bargaining, pretrial release and bail decisions, and sentencing.[20] All entries on an individual's record may be taken into account, regardless of whether a conviction resulted or when the events occurred.

Past convictions, sentences, indictments and arrests are also considered in a broad range of contexts outside the criminal justice system, regardless of when they occurred.

> [C]riminal history records are widely used for noncriminal justice purposes. Information contained in these records, for example, may be available to federal agencies for federal employment and security clearance determinations; to federal and state agencies for licensing decisions; to public and private employers for employment decisions; and to a countless variety of private sector decisionmakers for use in insurance, credit, housing and other important decisions.[21]

When criminal-history information is used for such purposes, a time limit is seldom imposed. The Department of Justice's own regulations allow recipients of Law Enforcement Assistance Administration ("LEAA") grants for criminal-history record systems to disclose even nonconviction data, without any time limit, for any purpose authorized by any state or local statute, ordinance, executive order, or court order. 28 C.F.R. § 20.21(b)(2)

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[20] *See, e.g., Michelson* v. *United States*, 335 U.S. 469 (1948) (27-year-old arrest may be inquired of in cross-examination of a character witness); *United States* v. *Lee*, 818 F.2d 1052, 1055 (2d Cir.), *cert. denied*, 108 S. Ct. 350 (1987); *Russell* v. *United States*, 402 F.2d 185, 187 (D.C. Cir. 1968); *Rhodes* v. *United States*, 275 F.2d 78, 82 (4th Cir. 1960); *State* v. *Nolan*, 316 S.W.2d 630, 633-34 (Mo. 1958). *See generally* Search Group, Inc., Bureau of Justice Statistics, *Criminal Justice Information Policy: Data Quality of Criminal History Records* 13-15 (1985) (hereafter "*Data Quality*").

[21] *Data Quality, supra*, at 12 (footnote omitted).



1987.[22] Those regulations impose *no* restrictions on dissemination of conviction data—to ensure that such data "could continue to be disseminated routinely." 28 C.F.R. Part 20, App., p. 305 (1987).

The FBI itself broadly disseminates criminal-history information for use in connection with licensing, employment, and other non-criminal-justice decisions. *See* 28 C.F.R. § 20.33(a)(2)-(3) (1987). In fiscal year 1983 alone, the FBI's Identification Division performed approximately 3 million criminal-record searches for federal and state agencies outside the criminal justice system, for federally chartered banks and for the securities and commodity futures industries.[23] The only time limit imposed is that arrest data unaccompanied by information as to the disposition of the arrest will not be disseminated for use in non-federal licensing or employment decisions if the arrest is more than one year old and no active prosecution of the charge is known to be pending. *Id.* § 20.33(a)(3). Even that time limit does not apply to disclosures to federal agencies or to criminal justice agencies, and no time limit of any kind is imposed on dissemination of any nonarrest data or arrest data accompanied by dispositions.

The fact is that the Department of Justice has created facilities for the very purpose of gathering criminal-record information, retaining it indefinitely, and distrib-

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[22] "[S]ome states authorize the use of criminal records for *any* occupational licensing or employment purpose . . . ." Search Group, Inc., *A Study To Identify Criminal Justice Information Law, Policy and Management Practices Needed To Accommodate Access to and Use of III for Noncriminal Justice Purposes* 18 (unpublished monograph for the FBI, 1984) (hereafter "*Noncriminal Justice Purposes*") (emphasis added).

[23] *See Noncriminal Justice Purposes, supra*, at 3, 23. For example, under § 3(a) of Executive Order No. 10,450, 3 C.F.R. 936 (Comp. 1949-53), a check of the FBI's criminal-history files is required as part of the background investigation conducted with respect to all federal employees.

uting it for use both inside and outside the criminal justice system. The Department itself has concluded that individuals have no right to keep their criminal records secret simply because a period of years has passed.

That judgment is consistent with the judgment of the community. Individuals are often required to disclose their own criminal records without a time limit being imposed. For example, an employer generally has every right to ask a job applicant to disclose his criminal record, including any arrests.[24] The numerous contexts in which the government discloses criminal-history information and in which individuals are themselves required to disclose such information, without a time limit being imposed, demonstrate that the mere passage of time does not make criminal-history information private.[25]

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[24] *See* Rehnquist, *supra*, Part I, at 19. If a person's criminal record includes a felony conviction, that fact is not only subject to disclosure in a wide range of circumstances regardless of how old the conviction is, *see, e.g.*, Administrative Office of the United States Courts, Juror Qualification Questionnaire, AO-178D (Rev. Aug. 1986); Office of Personnel Management, Application for Federal Employment—Standard Form 171 (Rev. Feb. 1984); it is itself often a basis for permanent exclusion from government employment and from employment in various professions and occupations, *see Carafas* v. *La Vallee*, 391 U.S. 234, 237 & n.4 (1968); *De Veau* v. *Braisted*, 363 U.S. 144, 158-59 (1960) (plurality opinion), and for permanent disenfranchisement unless the governor or a special commission specifically restores the individual's civil rights, *see* A. Reitman & R. Davidson, *The Election Process: Law of Public Election Campaigns* 18 (1980).

[25] That "a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information," *Rose* v. *Department of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974) (footnote omitted), *aff'd*, 425 U.S. 352 (1976), quoted at Gov't Br. 31, scarcely suggests that information which is public in nature, a matter of public record, and subject to disclosure in many contexts becomes private merely because time has passed since the events in question. *Rose* involved a totally different situation. The information at issue in *Rose* concerned Honor Code and Ethics Code violations by cadets at a military academy, not criminal conduct;



The passage of time surely does not create any legitimate expectation of privacy in this case. The Medicos chose to seek lucrative defense contracts, and in doing so invited scrutiny of their fitness. In *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971), this Court specifically held that "a charge of criminal conduct, *no matter how remote in time or place*, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co.* v. *Sullivan*." *Id.* at 277 (emphasis added). Similarly, when a company has received government contracts with the help of a Congressman under investigation for conflict of interest and corruption, evidence that a principal of the company was arrested, charged or convicted for committing a crime can never be irrelevant to the company's fitness.[26]

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was available only within the military academy; was redacted in all not-guilty and discretion cases to protect the identity of the cadet; and even in guilty cases was not made available until after the guilty cadet had left the academy.

[26] Search cites another factor purportedly creating a privacy interest: the risk that the records disclosed will not relate to the subject of the request. Br. 62. It suggests that the opinion below would force the Department of Justice "to provide criminal history records to the public solely on the basis of a record subject's name, and without benefit of a record subject's fingerprints, or even biographical data or other descriptions." *Ibid.* This is pure speculation and is unfair to the court of appeals. Nothing in the court of appeals' opinion prevents the Department from insisting on information adequate to identify the subject of the request. When insufficient identifying information has been provided, the Department is fully capable of saying so. Indeed, in this very case the FBI told the Reporters Committee it needed more information to perform an accurate search for records concerning William Medico, J.A. 55—even though his rap sheet had already been located and disclosed to Schakne, *id.* at 51.

[Continued]

### D. The Government's Arguments Based on the "Legislative Background" of Exemption 7(C)

Unable to find anything in the legislative history of FOIA to suggest that Congress intended to exempt publicly available criminal-record information from disclosure, the government resorts to a variety of other materials, including congressional hearings held in the early 1970s, the legislative history of a 1973 statute governing LEAA grants, and the Privacy Act, 5 U.S.C. § 552a. Br. 24-30. The government argues that these materials demonstrate that Exemption 7(C), which was enacted in 1974, was intended to cover criminal-record information. In fact, they demonstrate nothing of the kind.

1. It is remarkable that the government would rely on statements made in support of federal legislation proposed in the early 1970s that would have restricted dissemination of criminal-record information. Br. 25-27. If such legislation had been enacted, the information at issue here would be exempted from disclosure by statute under Exemption 3. But the proposed legislation was not approved, and the government has abandoned the claim that the information at issue is exempted by statute. What the government seeks to accomplish here is the judicial

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[26] [Continued]

The ACLU appears to suggest that a privacy interest is created by the fact that some criminal-history information collected by the Department of Justice is inaccurate or incomplete. Br. 12. The short answer is that the Department's data should obviously be as accurate and complete as possible, but concerns on that score cannot be equated with a legitimate expectation of privacy. Virtually any agency record could contain significant errors or omissions, but such potential shortcomings do not create an interest in privacy. Moreover, preventing access to the Department of Justice's files under FOIA would have the unfortunate effect of restricting public oversight of the actions taken by the Department to make its files accurate and complete.



enactment of restrictions that were considered but not enacted by Congress.

Even when legislation considered at congressional hearings is enacted, statements made at the hearings are often unreliable evidence of congressional intent. *See, e.g., McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931). When, as in this case, the statute in question—FOIA—was not given "any attention" at the hearings, Gov't Br. 26 n.12, and the legislation that was considered never became law, the statements provide no evidence whatsoever of congressional intent.[27]

2. Equally misplaced is the government's reliance on the legislative history of 42 U.S.C. (& Supp. III) 3789g

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[27] Even if the cited hearings were relevant, an examination of them demonstrates that there was no consensus that criminal-record information should be treated as private. For example, in the House subcommittee hearings cited by the government, Representative McClory opposed restrictions on dissemination of arrest records. He specifically noted that organized-crime figures "seem to be successful in obtaining favorable dispositions of their cases . . . particularly because they have very effective ties with the judiciary or other public officials." *House Criminal Justice Hearings* 84. Moreover, Attorney General Saxbe asserted that any state or municipality that chose to consider criminal-record information in making licensing decisions, even with respect to barbers or taxi-cab drivers, should be allowed to obtain such information from the Department of Justice if there is a state statute authorizing such access. *Id.* at 221-22. He stressed that "[w]e are dealing with public records," *id.* at 222, and that it is better for states and municipalities to obtain properly assembled and updated information than to force them to "go and search the dockets at the courthouse." *Id.* at 221. *See also, e.g., Criminal Justice Data Banks—1974, Hearings on S. 2542, S. 2810, S. 2963, and S. 2964 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. pt. 1 at 404 (1974) (testimony of Harold W. Andersen, President, Omaha World-Herald, and Vice Chairman, American Newspaper Publishers Association) ("Certainly when a citizen is arrested, tried and convicted and sentenced, the entire series of events, the entire transaction, if you will, is a public matter.").

(b), which concerns LEAA grants to state and local governments for criminal-history record systems. The government asserts:

> In the legislative history of that provision, Congress referred to "the unsettled and sensitive issues of the right of privacy and other individual rights affecting the maintenance and dissemination of criminal justice information."

Br. 27-28, quoting S. Conf. Rep. No. 349, 93d Cong., 1st Sess. 32 (1973). By quoting a fragment of the Senate Conference Report out of context, the government has distorted the meaning of the Report. The relevant portion of the Report reads:

> The conferees accepted the Senate version but only as an interim measure. *It should not be viewed as dispositive of* the unsettled and sensitive issues of the right of privacy and other individual rights affecting the maintenance and dissemination of criminal justice information. More comprehensive legislation in the future is contemplated.

(Emphasis added). The conferees went out of their way to dispel any notion that the legislation resolved whether criminal-justice information is private, and to explain that further legislation would be necessary to address that issue. There has, of course, been no further legislation.

3. The government also errs in arguing that the Privacy Act demonstrates that the term "privacy" in Exemption 7(C) was intended to encompass criminal-history information maintained by the federal government. Br. 30. In citing the provision allowing agencies to exempt criminal history records from most of the requirements of the Privacy Act (5 U.S.C. § 552a(j)(2)(A)), including the right of access by the subject of the records, Br. 30 n.18, the government is attempting to resurrect in another form the discredited contention that materials exempt from disclosure under the Privacy Act are also exempt under FOIA. The Department of Justice took this



position in amended regulations adopted in March 1984. 49 Fed. Reg. 12248, 12252 (1984). Later that year, however, Congress "specifically reject[ed] the interpretation set forth . . . in the new Justice Department regulations." [28] It adopted an amendment to the Privacy Act providing that "[n]o agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under [FOIA]." [29]

The legislative history of this amendment reveals Congress's unequivocal rejection—specifically with reference to law enforcement records—of any suggestion that the exemption of records from the Privacy Act's requirements supports a claim of exemption under FOIA:

> The [Privacy Act's] exemptions are . . . different than the exemptions of the FOIA because the Privacy Act has different purposes. For example, some criminal law enforcement records can be exempted from the Privacy Act's access provision. The Privacy Act also permits these records to be exempted from the provision permitting amendment of records. Exemptions also cover many other of the Act's requirements. *The exemptions do not serve the same purpose as the exemptions of the FOIA.*
>
> Since the Privacy Act is not exclusively an access law, there is no reason why its exemptions should be read to have the same effect as the exemptions of the FOIA. . . . *There are perfectly rational reasons why access to a record may be allowed under the FOIA when access to the same record is denied under the Privacy Act.*
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> Access to records under the Privacy Act normally entails a corresponding opportunity to seek amend-

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[28] H.R. Rep. No. 726, Part II, 98th Cong., 2d Sess. 14 (1984).

[29] Central Intelligence Information Act, Pub. L. No. 98-477, § 702(c)(2), 98 Stat. 2212 (1984), *codified at* 5 U.S.C. (Supp. IV) § 552a(q)(2).

> ment of information that may be in error. . . . *For some records systems, particularly those maintained by agencies with intelligence and criminal law enforcement functions, Congress allowed agencies to exempt records from the amendment process.* This exemption was permitted because of the nature of law enforcement and intelligence records and because it is not easy or desirable to mandate a right of amendment for all of these records all of the time.
>
> *Continued access to those records under the FOIA is not inconsistent with the exemption from access under the Privacy Act.*[30]

Congress, in short, expressly recognized that access to law enforcement records under FOIA is *not* inconsistent with the Privacy Act's exemption for such records.

The Privacy Act does reflect Congress's concern about data banks, but that concern is irrelevant to the interpretation of FOIA. The requirements of the Privacy Act apply to *any* information about an individual contained in a "system of records," *i.e.*, a group of records "from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5) & (b) (emphasis added). Those requirements are not limited to private facts; they cover even the most public facts about an individual—facts which are clearly subject to disclosure under FOIA—if they are contained in a "system of records." To say that the Privacy Act reflects a concern about data banks thus proves nothing about whether particular information, whether located in data banks or elsewhere, can be withheld under FOIA.

The Privacy Act actually undermines the government's assertion that a privacy interest is created for purposes of

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[30] H.R. Rep. No. 726, Part II, at 15-16 (emphasis added) (footnotes omitted).



FOIA when information is compiled in a data bank. When Congress addressed data banks in the Privacy Act and determined that certain protections were required, it specifically provided that the restrictions on disclosure imposed by the Privacy Act do *not* apply where "disclosure of the record would be * * * (2) required under section 552 of this title." 5 U.S.C. § 552a(b). This provision reflects a considered judgment that, whatever concerns data banks may raise, they do not justify *any* restriction on the broad right of access guaranteed by FOIA.

Much of the concern about data banks has been directed to compilations of data that disclose so much about a person's activities as to reveal a great deal about his private life. *See, e.g.*, A. Westin, *Privacy and Freedom* 165 (1967). Whatever the force of that concern, it is not implicated here. This case does not involve an attempt to obtain a detailed profile of an individual. Respondents sought disclosure of only a discrete and very limited part of Charles Medico's history—the official, public actions (if any) taken to arrest, indict, convict or sentence him for committing a crime.[31]

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[31] The decision below does not impose unreasonable administrative burdens on the FBI. Gov't Br. 36-39. Because criminal-record information is so widely available to the public from court files and police records, the FBI can and should presume that such information is a matter of public record and thus subject to disclosure under FOIA.

The Privacy Act certainly does not preclude such a reasonable presumption. Although its restrictions apply where disclosure is not required by FOIA, 5 U.S.C. § 552a(b)(2), an agency has no obligation under the Privacy Act to undertake a fact-finding investigation before it responds to a FOIA request. Given the strict time limits imposed by FOIA, 5 U.S.C. § 552(a)(6), that could not have been Congress's intention. The FBI can fulfill any obligation under the Privacy Act by simply determining whether it has any information in its possession indicating either (1) that it is not the practice of the source jurisdiction to permit public access to court files or arrest records, or (2) that a particular criminal-record

## III. THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS ANY MINIMAL PRIVACY INTEREST THAT MAY BE INVOLVED.

Even if there could be some attenuated privacy interest in criminal-history information that is a matter of public record, it would be outweighed by the public interest in disclosure in this case. The government argues at great length that the court of appeals should have focused on the particular facts of this case in assessing the public interest in disclosure. Br. 40-47. But nowhere does the government demonstrate that such an appraisal would support its conclusion that the public interest in disclosure is outweighed by the alleged privacy interest involved. In fact, as respondents have consistently argued, a consideration of the specific purpose of their FOIA requests, and the particular circumstances surrounding those requests, confirms that there was a strong public interest in disclosure, which easily outweighed any minimal privacy interest at stake.

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entry has been expunged or otherwise removed from the public domain. (The court of appeals' holding applies only to information that is in fact publicly available *and* is the type of information that the jurisdiction generally makes available. Pet. App. 20a, 41a-42a.) If it has no such information, it has no obligation to conduct an inquiry in the source jurisdiction.

If a particular jurisdiction wishes to ensure that either a general policy or a specific action (*e.g.*, an expungement) designed to remove criminal-record information from the public record serves to prevent access to the information from the FBI, it can accomplish its purpose quite easily by notifying the FBI whenever information is removed from the public record. Indeed, if the jurisdiction considered removal of the information from the public record an important step, it would presumably want to notify the FBI of the removal without regard to FOIA, so that the FBI would be aware of the jurisdiction's determination that the information should not be disclosed. Otherwise the FBI itself might rely on the removed information or disclose it even in the absence of a FOIA request.



It is entirely appropriate, respondents agree, for the Court to consider the purpose of their FOIA requests in assessing the strength of the public interest in disclosure.[32] A request supported by the central purposes of the Act should not be treated in the same manner as a request supported only by a commercial or other purpose largely unrelated to the goals of the Act. In this case, there is no question that the purpose of respondents' requests falls squarely within "[t]he basic purpose of FOIA"—"to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted). The court of appeals recognized as much, for although it purported to eschew any consideration of respondents' "precise journalistic purpose," Pet. App. 25a, it stressed that "the government is utterly incapable of explaining to us why the information sought here does not fall within the Act's 'core' policy," *id.* at 38a.

In considering the public interest in disclosure, a court should consider not only the purpose of the request, but also the nature of the information requested and the position of the individual whom the information concerns. Here the information was criminal-record information, which is inherently public. The information concerned the principals of a defense contractor found to be dominated by organized crime, and was relevant to an assessment of the fitness of that defense contractor and the conduct of a prominent government official.

What a court should not do, respondents submit, is what the district court did—determine that although

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[32] That is not to say that respondents have a special status as reporters. Other members of the public could have articulated precisely the same objective as they did, and would have been entitled to the same treatment.

criminal records could have a significant bearing on these matters, the particular information in the government's possession is insignificant. For "the purpose of FOIA is to permit the public to decide *for itself* whether government action is proper." *Washington Post Co.* v. *United States Department of Health & Human Services*, 690 F.2d at 264 (emphasis in original). The court of appeals' reasoning on this point is unassailable:

> The subjects of appellants' requests are alleged to have had dealings with government officials; it is surely up to the citizenry, once informed, to determine the relevance of the age of the arrests or convictions.

Pet. App. 38a.

The public had a strong interest in determining for itself whether a government contractor was dominated by criminals, whether a powerful Congressman had corruptly influenced the awarding of government contracts, and whether responsible government officials were taking appropriate corrective and punitive action. All of these interests supported respondents' FOIA requests and clearly outweighed any minimal privacy interest involved.

When Schakne began his investigation, the United States Attorney in Philadelphia was already investigating Congressman Flood for conflict of interest and corruption. *Ibid.* (Flood later pled guilty to charges of conspiring to solicit illegal campaign contributions from several persons seeking contracts with the federal government. 36 *Congressional Quarterly Almanac* 518, 525 (1980).) In the course of his investigation, Schakne learned that Congressman Flood had been instrumental in arranging Defense Department contracts for Medico Industries. J.A. 97. He also learned that the Pennsylvania Crime Commission had identified Medico Industries as a company "dominated by organized crime figures," and had reported that William Medico, the firm's



General Manager, had a criminal record that included "arrests for suspicion of murder and assault, and convictions for bootlegging and disorderly conduct."[33] *Ibid.* Moreover, both the Pennsylvania Crime Commission and the Federal Bureau of Narcotics had identified William Medico as a "criminal associate" of organized-crime leader Russell Bufalino. *Ibid.*

Schakne could have reported the findings of the Pennsylvania Crime Commission and the Federal Bureau of Narcotics without undertaking any investigation of his own. But he chose instead to seek more specific information, so that the public could judge the facts for itself. He undertook to investigate whether and to what extent Medico Industries was in fact controlled by organized-crime figures. Given the relationship of the Medicos to Congressman Flood, the allegations of corruption that had been made against Congressman Flood, and the findings of the Pennsylvania Crime Commission and the Federal Bureau of Narcotics, the criminal records of the Medicos were clearly a legitimate subject of inquiry.

In *Medico* v. *Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981), the Third Circuit specifically recognized that the Medicos were newsworthy because of their relationship to Congressman Flood. Phillip Medico had sued for libel based on a March 6, 1978 *Time* article discussing that very relationship. The article quoted a former Flood aide who had described Flood as "an official who used his considerable influence to direct federal contracts to people and companies that said 'thank you' in cash."[34] The article reported that Medico Indus-

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[33] The members of the Pennsylvania Crime Commission obviously did not believe they were invading Mr. Medico's privacy in reporting that information.

[34] *Medico* v. *Time, Inc.*, 509 F. Supp. 268, 269 (E.D. Pa. 1980), *aff'd*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981).

tries was suspected of being a link between Flood and Bufalino, and that Flood had steered government business to Medico Industries and travelled often on the company jet. 643 F.2d at 135. In holding that the *Time* article was privileged under the common law, the Third Circuit underscored the strong public interest in the topic of the article:

> Elected officials derive their authority from, and are answerable to, the public. If the citizenry is effectively and responsibly to discharge its obligation to monitor the conduct of its government, there can be no penalty for exposing to general view the possible wrongdoing of government officials. Because the alleged defamation of Medico occurred in an article analyzing the conduct of former Congressman Flood, we believe it implicates this aspect of the supervisory rationale [of the fair-report privilege]. Moreover, even though Time's publication arguably may have tarnished the reputation of Medico, a private individual, as well as that of Representative Flood, the public has a lively interest in considering the relationships formed by elected officials.

*Id.* at 141-42 (footnote omitted).

The Third Circuit was unquestionably correct. It would be difficult to imagine a matter of more substantial and legitimate public concern than the relationship between a potentially corrupt Congressman—who was one of the most powerful figures in the House of Representatives—and a defense contractor that a state commission had found to be dominated by organized-crime figures. Confirmation that Medico Industries was dominated by organized crime would have raised grave questions, to say the least, about the conduct of Congressman Flood in arranging for the company to obtain government contracts; the actions of the Defense Department in awarding contracts to the firm; and the fitness of the firm to continue to perform such contracts.



Under these circumstances, the public interest in disclosure of the Medicos' criminal records was compelling. "[E]nsur[ing] an informed citizenry . . . needed to check against corruption" is a "basic purpose" of FOIA. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. at 242. The public interest in disclosure of information relevant to whether corrupt practices are occurring outweighs privacy interests far more substantial than those asserted here. In *Columbia Packing Co.* v. *United States Department of Agriculture*, 563 F.2d 495 (1st Cir. 1977), which the government itself cites, Br. 45 n.33, disclosure of the personnel files of former meat inspectors was ordered despite "weighty" privacy interests, because of the strong public interest "in whether public servants carry out their duties in an efficient and law-abiding manner." 563 F.2d at 498. *A fortiori*, disclosure must be ordered where, as here, any privacy interest is minimal. *See also, e.g., Cochran* v. *United States*, 770 F.2d 949, 956 (11th Cir. 1985) ("the balance struck under FOIA exemption six overwhelmingly favors the disclosure of information relating to a violation of the public trust by a government official").

The public interest in exposing official corruption was not the only public interest supporting respondents' FOIA requests. Whether a defense contractor is controlled by criminal elements is a matter of great public concern, even if no official corruption was involved in awarding contracts to the company. The public was entitled to know whether Medico Industries was dominated by organized crime and, if so, what corrective and punitive measures were being taken by responsible officials.[35]

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[35] There is also a strong public interest in information concerning organized crime even when government contracts are not involved. *See, e.g., Medico* v. *Time, Inc.*, 643 F.2d at 142 ("Time's publication of FBI materials mentioning [Phillip] Medico served a legitimate public interest in learning about organized crime"); *Miller* v. *News Syndicate Co.*, 445 F.2d 356, 358 (2d Cir. 1971); *Time, Inc.* v.

The government argues that disclosure would not serve the "core purposes" of FOIA because

> Mr. Medico is not himself a public official, and, although he is alleged to have had dealings with a former public official, no "financial crime" records that arguably might bear on that official's discharge of his public duties exist.

Br. 49 (footnote omitted). That Charles Medico himself is not a public official hardly eliminates the public interest in this case; nor does the fact that Congressman Flood resigned from the House of Representatives in 1980 after pleading guilty to criminal charges. *See* 36 *Congressional Quarterly Almanac* at 525. When the FOIA requests were submitted in 1978, Flood was Chairman of the House Appropriations Subcommittee and a senior member of the House of Representatives, J.A. 96, and the information requested was of current interest to the public. The public interest in disclosure must be judged as of the time the requests were submitted; otherwise, the government would unfairly benefit from the fact that its wrongful refusal to disclose the records led to this protracted litigation.[36]

Nor is the public interest satisfied by the government's assurance that there is no "financial crime" information

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*Ragano*, 427 F.2d 219 (5th Cir. 1970); *Wasserman* v. *Time, Inc.*, 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970). Confirmation that organized crime controlled an ostensibly legitimate business would have been important even if the company had not received federal contracts worth millions of dollars with the help of Congressman Flood.

[36] If the public interest in disclosure were assessed solely at the time of the final judicial balancing of interests, agencies would have an incentive to withhold documents relevant to a matter of public concern in the expectation that, by the time the case was finally decided in court, the matter would be stale and the public interest in disclosure therefore diminished.



concerning Mr. Medico. Respondents never limited their requests to "financial crime" information; they merely cited "financial crime" information as an *example* of the type of information that would be of great public interest.[37] It would be ludicrous to suggest that such information is the only criminal-record information that would be a matter of public interest, and even the government appears to concede that other crimes would be relevant. Br. 49 n.36.

*Any* evidence that the Medicos had criminal records was of potential significance to Schakne's investigation. Any criminal conduct is a serious matter, particularly when the individual is a principal of a defense contractor that was found to be "dominated by organized crime figures." J.A. 97. Given Charles Medico's position, the court of appeals was correct in refusing to distinguish among different types of crimes, or among convictions, indictments and arrests. Since he was "alleged to have had dealings with government officials," Pet. App. 38a, and there was a substantial possibility that those dealings were corrupt, any information showing that he had a criminal record was pertinent. Even if Charles Medico had *no* criminal record, confirmation of that fact would have served the public interest. In short, the public interest would have been served by disclosure of the facts, whatever they are.

The government's crabbed view of the public interest is revealed by a hypothetical it has advanced. It has asserted that there would be no public interest in disclosure of information showing that Charles Medico, like William Medico, J.A. 52, was arrested in February 1931 for

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[37] J.A. 97 ("*For example*, a record of bribery, embezzlement or other financial crime by any of the principals of Medico Industries would potentially be a matter of great public interest since the company was receiving millions of dollars of federal funds.") (emphasis added).

violating the National Prohibition Act.[38] The government completely overlooks the fact that organized crime was extensively involved in bootlegging during Prohibition.[39] Such an arrest clearly would have been relevant to Schakne's investigation of whether the Medicos were involved in organized crime, particularly since Phillip Medico was convicted of transporting liquor in September 1930, *id.* at 118-19. Proof that Charles, William and Phillip Medico were all either arrested or convicted for bootlegging would have provided highly suggestive evidence that the family was indeed involved in organized crime, as the Pennsylvania Crime Commission had found.

In sum, respondents' requests were supported by a strong public interest in disclosure. Even if it could be said that there was some minimal personal privacy at stake, that interest would be far outweighed by the compelling public interest in learning whether a company to which an allegedly corrupt Congressman had steered lucrative defense contracts was in fact dominated by organized crime.

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[38] Reply Memorandum for the Petitioners, April 1988, at 3 n.4.

[39] *See, e.g.*, Nelli, *American Syndicate Crime: A Legacy of Prohibition*, in Law, Alcohol and Order 123-37 (D. Kyvig ed. 1985).



## CONCLUSION

It stretches the concept of personal privacy beyond recognition to say that an individual's criminal record is a private affair. And it unduly limits the concept of the public interest to suggest that the public had no legitimate interest in the criminal records at issue in this case—those of the principals of a firm that had received lucrative defense contracts through the assistance of an allegedly corrupt Congressman, and that had already been found to be dominated by organized crime. Disclosure of those records would not constitute an unwarranted invasion of personal privacy. The judgment of the court of appeals should therefore be affirmed.

Respectfully submitted,

KEVIN T. BAINE
*Counsel of Record*
PAUL MOGIN
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
(202) 331-5000
*Counsel for Respondents*